

Application Serial No. 10/091,160  
Attorney Docket No. 67328

(3) REMARKS

Reconsideration and allowance of claims 1-10, all of the claims under consideration, are requested in view of the above amendments and the following remarks. No claims have been added or cancelled.

It will be recalled that the invention relates to a process for forming a food bar containing discrete pieces of crisp cookie bound together by a binder comprised of two different types of normally solid fats. The process and the binder ingredients are uniquely combined to permit forming the food bars without breaking up the discrete crisp cookie pieces or otherwise adversely affecting their highly desirable texture. The art has not proposed such a product and has, therefore, not addressed the problems which would be encountered in making it with conventional technology. The cookie pieces are crisp and recognizable both before and after processing. A series of heated compression rolls is used to achieve the desired bar shape by maintaining the pliability of the bar ingredients during shaping by applying gentle pressure. The crisp cookie pieces are not substantially crushed, thereby retaining a light product density. The crisp cookie pieces are not ground into a dust or crumb, which would produce a dense product. The claimed fat-based binder is effective in holding them together, yet does not impart the usual chewy bar texture. When the cookie pieces are bound together and lightly compressed for shaping, the product has a light, crispy texture with recognizable cookie pieces. The processing to achieve these results is without precedent in the prior art.

Claims 1-10 have been rejected under 35 U.S.C. §103(a) as defining the invention in terms which make it obvious from the recipe in "Excellent No Bake Cookie/Candy Collection" by Sherry Lewis in view of Froseth, *et al.* This rejection is respectfully traversed because the references do not provide any reason or motivation for the skilled worker to combine their teachings, the references are in fact at odds with each other, and even if the combination were made the invention as claimed would not be taught or suggested. The person of ordinary skill in the art would not have found the invention as a whole obvious at the time the invention was made.

Application Serial No. 10/091,160  
Attorney Docket No. 67328

The examiner concedes that the claimed invention is not shown by either reference and argues that several limitations in the claims are not seen as providing patentable distinctions. Each of the examiner's specific statements is respectfully traversed.

The examiner states that the butter in the recipe (presumably Lewis) is the fat, while the claims recite filler fat and coating fat and that there is no distinction between the fats. These statements are respectfully traversed. Applicants point out that there are important differences. First, the terms used defined in the application text in paragraph 47 in the following terms:

The term "filler fat" as used here is synonymous with "filling fat" and as used here has the meaning generally understood in the art--that is an oleaginous composition which is soft and spreadable at room temperature. A "coating fat" as used herein also has the meaning generally understood in the art--that is a hard, oleaginous material which at room temperature preferably breaks with a snap and which melts sharply at or about body temperature, thus contributing to a mouthfeel associated with cocoa butter.

It is clear to the person skilled in the art, even without these definitions, that filler fats must be soft and spreadable, while coating fats are intended to simulate the texture and melt of chocolate.

While both the filler fats and the coating fats have significant solid fat contents -- they must not flow at room temperature -- the coating fat will require more solids and have a saturated fat content that actually hardens, ideally to snap like chocolate. The person skilled in the art will recognize that butter is commonly used in making frostings and fillers due to its soft, spreadable texture at room temperature. Butter, unfortunately, typically has a moisture content of 15% or so, which can affect product texture and stability. Chocolate has essentially no moisture and a fat having a composition similar to it must be included with a filler fat to achieve the objectives of the invention. In addition to the above-noted definitions, applicants' description also refers to United States Patent No. 5,378,490 to Wheeler, *et al.*, which gives specific examples wherein fillers and coatings are described.

The present invention requires a blend of the two types of fats -- it must have some of the filler fat and some of the coating fat to achieve an effective binder consistency that does not adversely affect either the crisp cookie or a subsequently applied enrobing coating. For use as a binder, the coating fat would be too hard and the filler fat too soft. And, because the product is enrobed with a coating fat, the fat blend used for the binder cannot be so soft as butter or it would

Application Serial No. 10/091,160  
Attorney Docket No. 67328

migrate into the enrobing layer and make it greasy to the touch. The butter as used by Lewis would not be satisfactory because of its significant moisture content. It must be remembered that the product is formed cold without any significant reduction in moisture and is then enrobed. Thus, all moisture would be trapped internally of the enrobing and would be present to adversely affect the texture of the cookie pieces. Those skilled in the art are aware that crisp cookies rapidly lose their desirable texture in humid storage. Accordingly, the Lewis recipe does not address the problems of the invention of binding crisp cookie pieces in a manner to keep them crisp and does not even accidentally suggest a solution to the problems. Butter would, over time, cause the cookie pieces to lose their crisp texture.

The types of products of the Lewis recipe and the Froseth, *et al.*, process are unique and distinct, offering no obvious connection to each other or to the present invention. Lewis has a dry base formulation comprised of graham cracker crumbs. These are not discreetly discernable pieces as applicants thought would be desirable in their product. Nor are they cereal pieces as used by Froseth, *et al.* The binder of Lewis is not mixed separately as a binder and then blended with the dry graham cracker crumbs. The whole batch, which contains butter (with significant moisture), peanut butter, confection sugar and graham cracker crumbs, is mixed up together. It forms a soft mass. It needs refrigeration to firm, and will not be firm with crisp cookie pieces when finished. The Froseth, *et al.*, process, on the other hand forms a discrete binder mix as shown in Fig. 2B. It is quite complex in its various steps and, again, has a significant moisture content. While the reference indicates that moisture control is important to retain crispness in essential cereal components, the reference describes the product cereal bars as "crunchy, yet chewy". Thus, unlike the present invention, the Lewis recipe does not form a product having any crunch and the Froseth, *et al.*, patent does not produce a fully crisp product. And, unlike the invention, neither reference process employs a dry, fat-based binder to maintain crispness of discrete cookie pieces without providing its own chewy character.

The Office Action states that it would be obvious to break the cookies into any intermediate size. However, this is not supported by the references, which simply don't contemplate a product of the type applicants have made. Nowhere does the prior art talk of a product made up of a relatively

Application Serial No. 10/091,160  
Attorney Docket No. 67328

large proportion of relatively large, crisp baked cookie pieces, especially one containing a substantial number of baked cookie pieces which will not pass through a screen with a mesh size of at least about 0.157 inches.

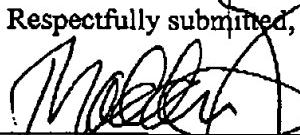
The invention is more than just the idea of using crisp cookie pieces as the central feature of a food bar, but the selection of crisp cookie pieces then requires a lot of creative thought as to how to form a bar without destroying the distribution of cookie piece sizes and without destroying the crisp cookie texture. Selection of binder materials to provide low moisture, yet cohesion is important. Importantly, also, the binder must be compatible with an enrobing coating applied over the surface. The invention provides an indulgent food bar product comprising relatively large fragile pieces of a baked cookie product, giving the product a friable, crunchy texture. The selection of a particular particle size cannot be dismissed as insignificant and obvious. The skilled worker is given no parameters within which to optimize or select. And, the prior art does not teach how to bind crisp cookie pieces and shape them into a bar while retaining size and texture. Therefore, the size choice is not obvious within the meaning of the statute.

The prior art does not provide sufficient teachings to the person of ordinary skill in the art that would have made the invention as a whole obvious at the time the invention was made. The invention as a whole involves processing crisp cookie pieces to form a food bar containing discrete pieces of crisp cookie bound together by a binder comprised of two different types of normally solid fats, which is an effective binder, performs well during processing and yet can be enrobed without problems for the enrobing or the texture of the cookie pieces. Because the process and the binder ingredients are uniquely combined to permit forming the food bars without breaking up the discrete crisp cookie pieces or otherwise adversely affecting their highly desirable texture, a continuous process is enabled. The failure of the art to address the problems which would be encountered in making such a product with conventional technology is evidence that applicants' invention as a whole unobvious. The only description of such problems and the claimed process for addressing them come from applicants' very disclosure of their invention. The prior art is not properly selectively taken apart and recombined, without the benefit of a teaching to do so, to arrive at both a product and process out of the contemplation of the art itself.

Application Serial No. 10/091,160  
Attorney Docket No. 67328

Applicants have made a significant contribution to the art of food bars, and especially those that have a crisp texture and can be cold formed continuously. The claims set forth the invention clearly and concisely in terms which distinguish from the prior art. Accordingly, allowance of all claims is believed in order and such action is earnestly solicited.

Respectfully submitted,

  
Thaddius J. Carvis,  
Attorney for Applicant  
Registration No. 26,110

102 North King Street  
Leesburg, Virginia 20176  
Tel (703) 737-7817  
Fax (703) 737-7813